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DEALER RECOVERY FOR UNREASONABLE REFUSALS TO DEAL UNDER SECTION 1 OF THE SHERMAN ACT

The oligopolist or "big-firm" requires special treatment within the contours of the Sherman Act.¹ Although government prosecutions enjoy the legal spotlight at present,² the private treble damage action should not be overlooked as an effective deterrent to abuses of market power. The time is ripe for refining theories of recovery and developing novel and effective remedies for the injured party in light of the "new attitude" toward antitrust law.

In the Colgate decision³ of 1919 the Supreme Court recognized the unqualified right of a business entity to deal or not deal with whomever it chooses. But absolute antitrust immunity for refusals to deal is difficult to accept in the context of the modern oligopoly or multi-firm industry with several dominant producers.⁴ Since the producer enjoys a disproportionate percentage of the total market power, its refusal to deal may end a distributor's business. The distributor is in an inherently disadvantageous position; he must either meet the demands of the big-firm producer—demands that may range from resale price maintenance to territorial division—or forfeit a substantial percentage of his business. The courts have developed several techniques for reaching the offending firm without expressly overruling the Colgate decision. Although the emphasis has been on government prosecutions under the "per se" rules of Section 1 of the Sherman Act, effective protection for the dealer can and should be provided by devising potent private remedies for refusals to deal.⁵

¹ Brodley, Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy, 19 STAN. L. REV. 285 (1966). Precise definition of "big-firm" is difficult, but workable guidelines are provided by the "market power" test of Kaysen and Turner in their proposed Sherman Act amendment:

Market power shall be conclusively presumed where, for five years or more, one company has accounted for 50 percent or more of annual sales in the market, or four or fewer companies have accounted for 80 percent of such sales.


⁴ An oligopoly is a market situation in which each one of a small number of producers has sufficient market power to influence the market but not enough to disregard competitors. The auto industry is an example.

An industry with hundreds of producers may have several producers in control of 20% to 40% of the market. The liquor industry is an example of the multi-firm situation with several dominant producers—a quasi-oligopoly. Both market situations are characterized by the presence of big-firms.

⁵ The old remedies have proved ineffective. "Indeed, treble damage suits brought
The intra-enterprise conspiracy theory may provide the key to a workable solution. Examination of this theory in light of recent big-firm refusal-to-deal cases reveals that, although present intra-enterprise conspiracy theories may be effective as a stop-gap measure, the problem can properly be solved only with judicial recognition that big-firm refusals to deal require exceptional treatment. A new but related theory within the broad language of section 1 is necessary.

I

DEALER RECOVERY AND INTRA-ENTERPRISE CONSPIRACY—THE EVOLUTION TO KIEFER-STEWART

Section 1 of the Sherman Act, condemning every "contract, combination . . . or conspiracy, in restraint of trade," seems to require at least two participants to establish a violation. Nonetheless, "conspiracy" has been interpreted, under certain circumstances, to include conduct by a single economic entity. Thus, the General Motors empire, with its numerous corporate groupings, can form a conspiracy when one part of the corporate family acts in concert with another. The conceptual problems implicit in this result are amplified by the conflict between the "entity" theory of corporations and the practical fact that most corporations operate through the combined agency of numerous real persons.

In *Nelson Radio & Supply Co. v. Motorola, Inc.*, the plaintiff argued that a single corporation should be held liable under section 1 on the theory that its officers had conspired among themselves or with the corporation. Although an early case had held that such activity could constitute a conspiracy for Sherman Act purposes, the Fifth Circuit denied recovery, treating the single corporate form as a per se defense. The court noted:

It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with

by cut-off dealers have uniformly failed." Barber, *Refusals To Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 860 (1955) (footnote omitted), and cases cited therein.


7 United States v. General Motors Corp., 121 F.2d 376 (7th Cir.), cert. denied, 314 U.S. 618 (1941).

8 200 F.2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953). Nelson, a wholesale distributor of appliances, sought treble damages for Motorola's refusal to supply him with communications equipment, to which he was allegedly entitled under the distributor agreement.

9 Mininsohn v. United States, 101 F.2d 477 (3d Cir. 1939).
itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.\textsuperscript{10}

Subsequent cases\textsuperscript{11} and the Attorney General's National Committee To Study the Antitrust Laws\textsuperscript{12} have accepted the Motorola rule, but numerous writers have argued that the officer-conspiracy route is essential to effective regulation of the big-firm.\textsuperscript{13} It seems safe for the present, however, to conclude that the specter of per se illegality\textsuperscript{14} applied to business decisions of all but one-man firms effectively discourages the courts from parting with the Motorola holding.

Although Motorola frustrated any attempt to find a conspiracy among the officers of a single firm, two prosecutions against multi-corporate entities followed a different avenue, establishing in the 1940's what has become the traditional intra-enterprise conspiracy theory. In United States v. General Motors Corp.,\textsuperscript{15} the court found that appellants could not "enjoy the benefits of separate corporate identity and escape the consequences of an illegal combination in restraint of trade by insisting that they are in effect a single trader."\textsuperscript{16} Thus, if the eco-

\textsuperscript{10} 200 F.2d at 914.

\textsuperscript{11} A corporation has the right as a single manufacturer to select its customers and to refuse to sell its goods to any one, for any reason, and does not violate § 1 of the Sherman Act prohibiting conspiracy when it exercises that right through its own officers and agents. Herren Candy Co. v. Curtiss Candy Co., 153 F. Supp. 751, 755 (N.D. Ga. 1957); see Johnny Maddox Motor Co. v. Ford Motor Co., 202 F. Supp. 103 (W.D. Tex. 1960).

\textsuperscript{12} REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955) [hereinafter cited as COMMITTEE REPORT]. A good examination of the report's findings is Carlson, Basic Antitrust Concepts, 53 Mich. L. Rev. 1083 (1955).

\textsuperscript{13} Barndt, Two Trees or One?—The Problem of Intra-Enterprise Conspiracy, 23 Montana L. Rev. 158 (1962); Comment, Intra-Enterprise Conspiracy Under the Sherman Act, 63 Yale L.J. 372 (1954). But see, e.g., Sprunk, Intra-Enterprise Conspiracy, 9 ABA Antitrust Section 20, 31 (1956): "[T]he theory of intra-enterprise conspiracy is ill conceived, legally and economically unjustifiable and, in terms of antitrust policy and practices, untenable and unworkable."

\textsuperscript{14} Since they constitute significant impairment on free and unfettered competition, agreements among competitors to fix prices, share markets, collectively boycott, pool profits, or restrict production are illegal per se. Examples of vertical restraints subject to per se illegality are price fixing, territorial division, and customer restrictions. United States v. Arnold, Schwinn & Co., 388 U.S. 265 (1967). See Note, Restrictive Distribution Arrangements After the Schwinn Case, 53 Cornell L. Rev. 514 (1968). For the advantages of proceeding under the per se rule of § 1 instead of the monopoly provisions of § 2, see McQuade, Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act, 41 Va. L. Rev. 185, 184-88 (1955).

\textsuperscript{15} 121 F.2d 376 (7th Cir.), cert. denied, 314 U.S. 618 (1941). General Motors Corporation, General Motors Sales Corporation, General Motors Acceptance Corporation, and General Motors Acceptance Corporation of Indiana were convicted of conspiring in violation of § 1 to force GM dealers to use GM financing programs for both factory and consumer sales. For a good discussion of the possible interpretations of the General Motors case, see McQuade, supra note 14, at 189-92.

\textsuperscript{16} 121 F.2d at 404.
nomic entity chooses to do business as a multi-corporate organization, it provides courts with a handle for the section 1 frying pan. Although repeatedly contending that applying section 1 in the General Motors situation is necessary to prevent form from governing substance, the courts actually rely on the form of multi-corporateness to reach the substance of restraint of trade.

In United States v. Yellow Cab Co., where the parent manufacturing company required operating companies to buy cabs exclusively from the parent, the Supreme Court formulated the test of Sherman Act illegality as the presence or absence of an unreasonable restraint of trade. Affiliation or integration under common ownership was held not to vitiate liability where a conspiracy could be found if the companies were independent. The Court’s conclusion that the “corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act” was viewed by some as indicative of a judicial predilection for expansion of intra-enterprise conspiracy in both the inter-officer and parent-subsidiary areas. Later cases bear out the accuracy of the prediction in regard to the parent-subsidiary relationship.

The 1955 Committee Report accepted the intra-enterprise conspiracy theory, but restricted its application to parent-subsidiary conspiracies to restrain the trade of strangers to the corporate family. A minority of the sixty-one committeemen believed that a finding of conspiracy should not depend on the form of the organization and, therefore, that liability is inappropriate when a single economic entity is involved, regardless of its nominal divisibility. The majority disagreed, but recommended that the theory not be applied to enforce

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17 The possible advantages of multi-corporate form include:
[S]eparating sales from manufacturing and increasing efficiency; limiting the liabilities to each enterprise; dividing income at lower tax rates between the several enterprises; effectuating estate planning; creating entities which will permit eventual sale at capital gain; increasing the combined borrowing capacity of the resulting companies; creating a separate entity to handle a competitive line; incorporating a separate entity in a different locality to avoid prejudice against absentee ownership; transferring certain of the activities to another state whose laws favor a domestic corporation.

H. HENN, CORPORATIONS § 17, at 34 (1961).

18 332 U.S. 218 (1947).

19 Id. at 227.

20 Note, Are Two or More Persons Necessary To Have a Conspiracy Under Section 1 of the Sherman Act?, 43 ILL. L. REV. 551 (1948). For the view that the proper analysis of the Yellow Cab case is that the defendants were guilty of forming a combination to restrain trade rather than for conspiring to restrain trade, see McQuade, supra note 14, at 192-95.


22 COMMITTEE REPORT, supra note 12, at 30-36.
competition within the firm. Use of the intra-enterprise conspiracy theory, however, at least when external restraints by competing parts of a single economic entity are the judicial target, necessarily entails the regulation of competition within the firm. Thus, the Committee's adoption of the concept formulated in Kiefer-Stewart Co. v. Joseph E. Seagram & Sons seems odd.

*Kiefer-Stewart* is the leading intra-enterprise conspiracy case allowing dealer recovery after a refusal to deal. The plaintiff, an Indiana wholesale liquor distributor, stocked both Seagram and Calvert brand whiskies. Seagram and Calvert were incorporated subsidiaries of Joseph E. Seagram & Sons, Inc., but held themselves out to the public as competitors. When the plaintiff charged higher prices on resale than those fixed by Seagram, Seagram refused to sell. Calvert later joined the refusal on the grounds that it "had 'to go along with Seagram.'" The Court upheld treble damage recovery of almost one million dollars, reasoning that "common ownership and control does not liberate corporations from the impact of the antitrust laws. . . . The rule is especially applicable where, as here, respondents hold themselves out as competitors."

Stressing the illegality of an agreement between two parties not to deal with a third, the Court recognized that "Seagram and Calvert acting individually perhaps might have refused to deal." But since it declined to treat Joseph E. Seagram & Sons, Inc., as a single economic entity, the Court denied Seagram's single-trader defense. This technique of regarding the subsidiaries as separable economic and legal entities was adopted by the *Committee Report* as the ultimate extension of intra-enterprise conspiracy. The Committee attempted to

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23 "To demand internal competition within and between the members of a single business unit is to invite chaos without promotion of the public welfare." *Id.* at 34.  
25 *Id.* at 213.  
26 *Id.* at 215.  
27 *Id.* at 214.  
28 *Committee Report*, *supra* note 12, at 35. There has been strong objection to the case from other quarters:  
Finding a violation of Section 1 of the Sherman Act because of a conspiracy solely between a parent and its subsidiaries, or between subsidiaries, is like condemning the bi-sexual oyster for incest. Neither the oyster nor a corporate family should be condemned for something it cannot avoid.  
Even writers favoring the use of intra-enterprise conspiracy to reach big-firm misconduct have had trouble reconciling the *Kiefer-Stewart* holding with other intra-enterprise conspiracy cases. For example, the *Motorola* and *Kiefer-Stewart* rationales are seen as inconsistent, since artificial persons within a single enterprise (Seagram) can
draw a clear line by conceding that "there would . . . be no liability under Section 1, if a company does business through unincorporated branches, divisions or departments . . . ."29

Recent cases demonstrate that the intra-enterprise conspiracy theory is likely to undergo further refinement and that ultimately it may be necessary to remodel present conspiracy concepts to provide an effective private remedy for unreasonable refusals to deal.

II

A NEW WRINKLE IN INTRA-ENTERPRISE CONSPIRACY—THE HAWAIIAN OKE CASE

Hawaiian Oke & Liquors, Ltd., was a large wholesale liquor distributor in competition with, among others, McKesson & Robbins, Inc., until mid-1965. At that time, the suppliers of brands constituting more than fifty percent of Hawaiian Oke's sales exercised contract termination rights. Immediately thereafter, McKesson, which had recently formed a second wholesaling division, was given what had been Hawaiian Oke's business. The suppliers involved were Barton Distilling Company and its wholly-owned subsidiary, Barton Western Distilling Company, and Joseph E. Seagram & Sons, Inc. and its wholly-owned subsidiary, House of Seagram, Inc. House of Seagram had seven unincorporated sales divisions, three of which—Calvert, Four Roses, and Frankfort—dealt with Hawaiian Oke. After termination of the contract, Hawaiian Oke liquidated, ascertained its damages to be $290,000 and brought a treble damage action against Joseph E. Seagram & Sons, House of Seagram, McKesson, Barton Distilling, and Barton Western Distilling.30 Hawaiian Oke contended that McKesson, the Barton com-

29 COMMITTEE REPORT, supra note 12, at 35.
30 Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc., 272 F. Supp. 915 (D. Hawaii 1967). The action was brought under Section 4 of the Clayton Act, which provides:
panies, and the Seagram companies, together with the three unincor-
porated divisions of House of Seagram had combined or conspired to
restrain its trade in violation of Section 1 of the Sherman Act. The jury
returned a verdict in favor of the plaintiff, finding a conspiracy among
all named defendants.

The most important aspect of the case is a jury instruction pro-
posed by plaintiff, directing that each of the unincorporated divisions
of House of Seagram be treated as separate corporations for purposes
of determining whether there had been a violation of the antitrust
laws. Though prior cases seemed to favor the defendant, the court
recognized that the "factual conclusion that a division has independence
of action in the relevant business activity is critical to a determination
that the division is legally capable of conspiring." Alert plaintiff's
counsel supplied the court with a wealth of testimony permitting such
a conclusion. For example, when plaintiff's counsel asked the president
of Joseph E. Seagram & Sons to elaborate on divisional reporting prac-
tices, the witness replied:

Well, we run a pretty autonomous operation, and the heads of the
companies pretty well run their own shows. They keep me in-
formed or posted on what is taking place, but they don't report to
me for direction. We sort of have what you call a General Motors
type concept here.

Other testimony established that the divisions were in actual competi-
tion with each other, that they normally made independent management
decisions regarding choice of distributors, and that each division
set its own pricing and advertising policy. The court, therefore, had

[A]ny person who shall be injured in his business or property by reason of any-
thing forbidden in the antitrust laws may sue therefor ... and shall recover
threefold the damages by him sustained, and the cost of suit, including a reason-
able attorney's fee.

include §§ 1 and 2 of the Sherman Act and §§ 2, 3, 7 and 8 of the Clayton Act.

33 Id. at 917. For the purposes of returning a verdict, the divisions were to be treated
as House of Seagram.

34 Counsel argued that Deterjet Corp. v. United Aircraft Corp., 211 F. Supp. 348,
¶ 71,882 (S.D.N.Y. 1966), and other cases supported defendant's position that unincor-
porated divisions of a corporation cannot conspire. See Memorandum for Defendant
(D. Hawaii 1967).

36 Id. at 921.
37 Id. at 921-25.
no difficulty finding, "on the peculiar facts demonstrated," independent divisional operation in the pertinent business activity (sales), resulting in separate business entities under the antitrust laws. Various interpretations of *Hawaiian Oke* are possible. Should a similar divisional conspiracy case arise, defendant's counsel might distinguish *Hawaiian Oke* on grounds that the court may simply have found de facto corporations within House of Seagram, each independently subject to antitrust liability, or that it may have allowed recovery merely to prevent Seagram from escaping liability under *Kiefer-Stewart* by a mere change in formal organization. Neither interpretation is likely, however, in view of the substantial similarity between subsidiaries and "independent" divisions. When divisional independence is not pronounced, the testimony in *Hawaiian Oke* makes it easily distinguishable.

Although *Hawaiian Oke* represents a new development in the theory of intra-enterprise conspiracy, its application may be limited to competing and possibly noncompeting divisions responsible for a restraint of trade. Big-firms not organized along these lines may remain immune from treble damage suits for unreasonable refusals to deal. Thus, significant restraints on trade, stemming from attempted impositions of vertical restraints may go unchecked unless a specific remedy can be developed for big-firm abuses.

### III

**REACHING "BIG-FIRM" UNREASONABLE REFUSALS TO DEAL— THE ORGANIZATIONAL CONSPIRACY THEORY**

If the *Hawaiian Oke* theory gains acceptance, the typical big-firm will expose itself to section 1 liability only when it chooses to do business in either multicorporate or divisional form. Should immunity from liability exist when a big-firm is not so organized? Should divisional organization be any more telling than corporateness? Ideally, the conduct of the defendant should be the sole test of liability. But a defendant must be brought within the language of section 1 if the

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38 It will be interesting to see what form the Seagram organization assumes as a result of the *Hawaiian Oke* decision.

39 For judicial awareness of the difficulty in attacking vertical restraints by § 1 treble damage actions, see, *e.g.*, United States v. Arnold, Schwinn & Co., 388 U.S. 565, 391 n.12 (1967) (Stewart, J. concurring):

One difference between a horizontal conspiracy and vertical restraints imposed by the manufacturer is that there is often serious question whether the latter conduct involves the "contract, combination . . . or conspiracy" required by § 1 of the Sherman Act. . . ."
plaintiff is to avoid the more difficult evidentiary burdens of other antitrust remedies, such as proving an attempt to monopolize under section 2. One avenue might be to treat the big-firm as a unique development requiring an entirely new judicial approach. The broad language of section 1 provides ample leeway for the development of new theories and allows an economically responsive court to achieve the desired results without blatant judicial amendment of the antitrust laws.

One writer contends that the judiciary must respond to today's economic structure by developing a judicial policy of "social control" aimed at enforcing "workable competition" within the big-firm, and that the intra-enterprise conspiracy theory provides the perfect vehicle for the evolution of this policy.40 Though the theory is exceedingly broad in scope,41 it does suggest a unique and feasible method for reaching unreasonable refusals to deal by a big-firm.

A small or medium-size distributor dealing with a big-firm operates under an inherent disadvantage. The dominant firm occupies a privileged position as the life-blood of the distributor's business and can dictate pricing regulations, territorial restrictions, special preferences, and other business policies.44 Although these demands can easily be refused prior to accepting a dealership, once the relationship has been established and a dealer has adapted his marketing technique, his financing arrangements, and possibly his physical plant to a specific product line, his ability to "take his business elsewhere" is substantially reduced. Thus, the distributor's freedom in the market is gradually eroded until he faces the choice of living uncomfortably with the big-firm or not living at all. The privileged big-firm should, therefore, be held in check, and some method of satisfying the plurality requirement of conspiracy should be developed.

The rationale for reaching this single-firm abuse of power lies in the organizational structure of the big-firm.45 The large businesses in our

41 [I]n my view, the regulation of the internal relationships of the economic entity is required around the whole circle, and, indeed, the extension and development of such regulations represents a next necessary phase in the development of the law.
Id. at 166.
42 A small distributor might be characterized as serving less than 5% of the market and a medium-size distributor as serving up to 20%. If the distributor controls a larger percentage of the market, his bargaining power eliminates the need for special treatment.
43 See note 1 supra for an explanation of "big-firm".
44 Although such restrictions, once accepted by the dealer, can be attacked by the enforcement agencies as a conspiracy in restraint of trade, this is small consolation to the dealer who has rejected such demands and had his distributorship cancelled.
45 See Solo, supra note 40, at 156-59.
economy can hardly be equated with the entrepreneurial midgets of former eras. Transcontinental enterprises have grown by merger, acquisition, and consolidation to positions of power in a wide variety of manufacturing and service industries. These complex economic giants bear little resemblance to the entities created by the industrialists of the 1890's. For the big-firm, operating from a single locality is seldom feasible. Centralized decision-making and fusion of ownership and control are impractical. Alfred P. Sloane, Jr., summarizing his analysis of the General Motors complex remarked that "[a]n organization does not make the decisions; its function is to provide a framework, based upon established criteria, within which decisions can be fashioned in an orderly manner."

Typically, the decisions "fashioned" within this framework are achieved not through the decision-making function of a single individual or department, but rather through the interaction of severable parts of the organization. Whether these parts are characterized as subsidiaries, divisions, or branches is unimportant to the determination of their indispensability. As an organization grows, decision-making bodies evolve within the firm, each primarily concerned with its particular sphere of activity in the business framework. Diverse and often competing divisions of the firm function sometimes autonomously and sometimes in concert, depending on the activity involved. These related but severable pockets of power may be delineated by product or geographical area, or may crystalize along the familiar lines of manufacturing, research and development, finance, public relations, and sales. Whatever form the big-firm adopts, decentralization by function and evolution of pockets of power are inevitable concomitants of its growth.

This multiplicity of decision-making bodies should be viewed as supplying sufficient plurality for section 1 purposes. Thus, when a plaintiff demonstrates a refusal to deal by a big-firm—a firm with fifty percent or more of annual sales in the market, or one of four or fewer companies accounting for eighty percent of sales

46 A. SLOAN, MY YEARS WITH GENERAL MOTORS 443 (1964).
47 The courts have used similar sales-percentage formulas as tests for the existence of a monopoly. See United States v. Aluminum Co. of America, 148 F.2d 416, 423-34 (2d Cir. 1945). In non-monopoly cases such percentages are frequently resorted to as an aid in reaching a decision. See United States v. Arnold, Schwinn & Co., 388 U.S. 365, 368-69 (1967).

In the United States, antitrust legislation does not operate against a dominant per se; thus, "mere size is no offense." This particular ruling has been qualified, however, by the dictum that "... size carries with it an opportunity for abuse that is not to be ignored ... ."

should be within the “conspiracy” provision of section 1. His chances of recovery will then turn on the treatment accorded the refusal to deal.

A plaintiff should have the advantage of per se rules if the refusal to deal stems from an attempted imposition of vertical restraints that are illegal per se—price-fixing, territorial division, and post-sale customer restrictions. If the refusal to deal is not within the per se class, or is best characterized as arbitrary, the rule of reason should be applied. A defendant can escape liability by demonstrating a “good business reason” for his refusal to deal. Under this approach, arbitrary refusals to deal, never before reached under the antitrust laws, will be illegal—an appropriate result in light of the big-firm’s privileged position. On the other hand, a refusal stemming from noncompliance with restrictions not per se illegal (i.e., exclusive dealing arrangements) will be allowed if the defendant demonstrates a valid justification. The effect on commerce of the defendant’s action becomes the primary consideration, while a major criticism of the intra-enterprise conspiracy theory—the absence of any attempt to ascertain the offending party’s economic strength—is eliminated. Founded on the recognition that “there is nothing in Section 1 of the Sherman Act which exempts ‘single traders’ in the economic sense of that term from the prohibitions against restraining trade,” the organizational conspiracy

48 See note 14 supra for an explanation of per se illegality.


50 An example of a vertical restraint not yet per se illegal is an exclusive dealing arrangement.

51 Although the Sherman Act condemns all contracts, combinations, or conspiracies in restraint of trade, the Supreme Court limited the statutory prohibitions to unreasonable restraints of trade. The judicial formulation of this rule of reason is in the 1911 Standard Oil opinion:

The merely generic enumeration which the statute makes of the acts to which it refers and the absence of any definition of restraint of trade as used in the statute leaves room for but one conclusion, which is, that it was expressly designed not to unduly limit the application of the act by precise definition, but while clearly fixing a standard, that is, by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute. Standard Oil Co. v. United States, 221 U.S. 1, 63–64 (1911). “Rule of reason” is actually a misnomer, since the concept is an approach or technique, not a rule in the strict sense of that term.

52 “A boycott by a powerful corporation, under the ratio decidendi of the courts, would presumably be upheld while the combined boycott of several pigmies would be denounced.” Handler, Unfair Competition, 21 Iowa L. Rev. 175, 207 (1936) (footnote omitted).

theory provides an economically valid and legally sensible handle for the regulation of market power excesses manifested in unreasonable refusals to deal.

IV

PRESENT INTRA-ENTERPRISE CONSPIRACY AND ORGANIZATIONAL CONSPIRACY THEORIES COMPARED—Amplex of Maryland

The facts of Hawaiian Oke invited application of the traditional intra-enterprise conspiracy theory. But when the defendant is not organized by divisions or the divisions are not competing, or when the injured distributor dealt with only one division of a multi-division firm, this approach is not likely to be followed. The organizational conspiracy theory, however, allows the imposition of liability in all the above situations provided defendant is a big-firm.

Amplex of Maryland, Inc. v. Outboard Marine Corp.54 illustrates the usefulness of the organizational conspiracy theory when intra-enterprise conspiracy concepts are inapposite. Amplex was a marine store with an established retail business on Chesapeake Bay. Outboard is the nation’s largest manufacturer of outboard motors. Its most successful products are manufactured by separate divisions—Johnson Motors Division and Evinrude Motors Division. Johnson Motor’s policy, established in 1957, was that no dealer in its product should be refused, nor any dealership cancelled, solely because the dealer desired to market a competing line of engines.55 This policy was in force in 1960 when Outboard granted Amplex a dealership, although Amplex, at that time was also retailing Scott-Atwater engines. The initial dealership agreement was later extended until September 30, 1961. In June 1961, Amplex began selling Mercury outboard motors. This action was protested by Outboard’s district sales representative in charge of dealer accounts, orders, and franchises. The representative advised Amplex that unless dealings with Mercury were terminated, Outboard would

54 380 F.2d 112 (4th Cir. 1967).

[A] manufacturer must be free, in so far as the antitrust laws are concerned, to replace an existing distributor with a new one regardless of the hardship for the former and even in the absence of any plausible justification.

not renew the dealership. When Amplex failed to drop Mercury, Outboard refused to deal. Amplex sued Outboard for violation of Sections 1 and 2 of the Sherman Act. By agreement of the parties, the trial court, sitting without a jury, separately tried the issue of liability under the antitrust laws, and dismissed for failure of proof. Its judgment was sustained on appeal. Although no intra-enterprise conspiracy argument was advanced, the case provides a useful vehicle for analysis.

Amplex was not suited to application of the intra-enterprise conspiracy theory. In contrast to Hawaiian Oke & Liquors, Amplex was not dealing with several divisions of a single firm; and although Outboard was organized with ostensibly competing divisions, the decision to drop Amplex came not from agreement by the division heads but directly from Outboard through its district representative. Without plurality at the divisional level, and without independence of action by the division, plaintiff would be forced to establish plurality—separate legal entities—by arguing that Johnson Motors Division and Outboard Marine Corporation were the conspiring units. Obviously, these entities do not compete, but this need not be determinative. The General Motors court specifically dealt with the noncompetition problem, finding that a "combination of noncompetitors may conspire to restrain unreasonably the interstate trade and commerce of third parties and thereby subject themselves to the prohibitions of the Sherman Act." Though this dictum might aid Amplex, there is another more difficult hurdle. The liaison activities of the district representative contrast sharply with the independence of the Seagram entities. Absent clearly defined entities, the plurality requirement of intra-enterprise conspiracy cannot be satisfied, and recovery will probably be denied.

A different result might be reached under the organizational con-

56 380 F.2d at 114-15. The appellate court raised the question of liability under § 3 of the Clayton Act but held it inapplicable to unilateral refusals to deal. Section 3 provides: [I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

57 United States v. General Motors, 121 F.2d 376, 404 (7th Cir.), cert. denied, 314 U.S. 618 (1941).
sparsity theory. The threshold requirement of big-firm organization can be demonstrated by a cursory presentation of Outboard's nationwide production and sales practices, accounting for over sixty percent of the outboard motor market in the United States. Amplex could then present evidence of compliance with business standards emphasizing Outboard's ostensible policy of nonexclusive dealing. If sufficient evidence is presented, recovery will turn on Outboard's demonstration of "good business reasons" for refusing to deal. In light of Outboard's apparent about-face on exclusive dealing, such a demonstration is unlikely. Thus, in situations where the substantial limitations on intra-enterprise conspiracy render that theory inapplicable, organizational conspiracy may permit recovery.

V

ALTERNATIVES TO ORGANIZATIONAL CONSPIRACY—NAKED RESTRAINT OR LEGISLATIVE AMENDMENT

Although the organizational conspiracy theory is a novel approach to antitrust law, it is less revolutionary than a related theory that despairs entirely of meeting the conspiracy requirement. The proponents of judicial disregard of the term "conspiracy" argue that the courts, as administrators of the antitrust laws, should make the presence or absence of an unreasonable restraint the only criterion of violation. The incidence and effect of the antitrust laws would thus be the same regardless of the form of organization. Detractors of the theory admit that it might be "attractive except for the fact that the sudden complete departure of the duality quality of conspiracy would expose a naked restraint of trade doctrine incapable of facing the legal world." How "naked" such a doctrine would be is questionable. If the courts apply

58 380 F.2d at 114.
59 Judge Rives's dissenting opinion in Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953), presents what is perhaps the most appealing argument for such a theory:
[P]laintiff cannot recover because the scheme was concocted under the cloak of immunity of a single corporate entity. At long last a method has been found to flout the purposes of the antitrust laws and to deny the victims any recourse to the courts.
Id. at 916.
60 Rahl, Conspiracy and the Anti-trust Laws, 44 ILL. L. REV. 743, 766 (1950). Rahl's solution to the problem of unreasonable exercise of market power, short of monopoly, is to approach such action "as an attempt to monopolize, with minor infractions left to the Federal Trade Commission's law of unfair competition." Id. at 767. Unfortunately, neither alternative is of much help to the private plaintiff attempting to avoid the time and expense of a § 2 action.
the rule-of-reason concept when actual conspiracy is absent and reserve per se illegality for situations in which conspiracy is present, antitrust actions will be facilitated without denominating as per se illegal every decision that injures another's business.

The broad language of Yellow-Cab—"[t]he test of illegality under the act is the presence or absence of an unreasonable restraint on interstate commerce"—or General Motors "[t]he test . . . is not so much the particular form of business organization effected, as it is the presence or absence of restraint of trade and commerce"—suggest a judicial preference for the naked-restraint theory grounded in the belief that nature of conduct rather than organizational form should govern. The naked-restraint theory also eliminates the need for the numerous fictions that haunt intra-enterprise conspiracy. The Sherman Act, however, does not condemn restraints of trade as such, but merely prohibits every "contract, combination, or conspiracy" to restrain trade. Thus, any proposal for complete disregard of the plurality concept requires an unreasonable construction of the Sherman Act or blatant judicial legislation.

The improbability that a court will impose liability in open disregard of the language of the statute makes naked restraint less attractive than organizational conspiracy. Under the latter theory, a court can limit liability to cases in which undue market power is present. No similar bounds can be applied under the naked-restraint theory, which would impose liability without regard to the size and market power of the defendant, thus ignoring the basic justification for expanded liability—preventing the big-firm's abuse of its privileged market position.

The word-bending and fictionalizing characteristics of both the intra-enterprise conspiracy and the naked-restraint theories have led several observers to conclude that the only reasonable solution is amendment of the Sherman Act. Professors Kaysen and Turner have proposed amendments allowing direct attacks on firms having excessive market power regardless of "conspiracy." For purposes of the amendments:

Market power shall be conclusively presumed where, for five years

61 332 U.S. at 227.
62 121 F.2d at 404.
63 See, e.g., C. KAYSEN & D. TURNER, supra note 1; Note, Chain Stores Under the Sherman Act, 47 COLUM. L. REV. 786, 799 (1947).
64 C. KAYSEN & D. TURNER, supra note 1, at ch. 4-5. The express goals of the policy are (1) limitation of market power, (2) achievement of desirable economic performance, (3) "fair" business conduct, and (4) redistribution of social power between large and small business. Id. at 45.
or more, one company has accounted for 50 percent or more of annual sales in the market, or four or fewer companies have accounted for 80 percent of such sales.\(^6\)

Section 2 would be repealed and a variety of forbidden activities requiring specific intent and carrying criminal penalties would be substituted.\(^6\)

Section 1 would be amended only to the extent of removing criminal penalties. The crux of the proposal is more revolutionary. The basic provisions would establish an Economic Court to determine, in an equity proceeding instituted by an Industrial Reorganization Commission, whether the big-firm's market power unreasonably injures trade and commerce. If unreasonable market power is found, the court would be authorized to order divestiture or division of defendant's assets. Unreasonable market power is not deemed a violation of the antitrust laws for purposes of private suits.\(^7\) Thus, although the proposed statute completely realigns the relationship between business and government, the specific problem of distributor recovery against the big-firm is ignored.

A less revolutionary but more practicable amendment could be drafted to cover this problem. Assuming that the manufacturer's market power places distributors in a disadvantageous position, a statutory limitation on the exercise of that power can fairly be stated. A requirement that refusals to deal with former distributors must be "justified" by valid business reasons would prevent the big-firm from unreasonably dropping a distributor whose economic survival is dependent on his dealings with that firm. Although this proposal is substantially more narrow and less dramatic than that of Kaysen and Turner, both suffer from the same defect. The present political scene makes any amendment of the antitrust laws unlikely. Furthermore, it is little comfort to the distributor who has lost his livelihood that future legislation will protect others from a similar disaster.

**CONCLUSION**

A variety of section I theories are available to a distributor whose trade is restrained by the unreasonable refusal to deal by a big-firm. Recent developments indicate that a broader application of the intra-enterprise conspiracy theory may be forthcoming. But inherent and

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\(^6\) *Id.* at 98.

\(^6\) *Id.* at 270-71.

\(^7\) *Id.* at 271-72.
judicially imposed limitations on that theory may seriously hinder dealer recovery. The most reasonable antidote may be the development of a new theory—the organizational conspiracy—recognizing the big-firm as a unique development requiring special treatment. Its acceptance will ultimately turn on the extent to which the courts are willing to develop further the "remarkable compound of law, economic philosophy, cultural commitment and social religion"⁶⁸ that is antitrust law.

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